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SBC Communications Inc.
1401 I Street, N.W.
Suite 1100
Washington, DC 20005



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May 23, 1997

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Federal Communications Commission -
Office of Secretary

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: *Ex Parte* Submission
Implementation of Section 255 of the Telecommunications Act of 1996
WT Docket No. 96-198

Dear Mr. Caton:

Enclosed for filing, on behalf of SBC Communications Inc. and Pacific Telesis Corporation, is an original and one copy of an *ex parte* communication in the above-referenced docket. This submission responds to a question raised during recent meetings with the Commission and provides a proposed language defining "readily achievable" for purposes of Section 255 of the Communications Act, as amended. Please date stamp and return the enclosed duplicate copy.

Should there be any questions about this matter, please contact the undersigned.

Sincerely,

A handwritten signature in cursive script that reads "Gina Harrison".

Gina Harrison

Encl.

cc: Jackie Chorney, Office of Chairman Hundt
Suzanne Toller, Office of Commissioner Chong
Dan Phythyon, Chief, Wireless Telecommunications Bureau
Elizabeth Lyle, Senior Legal Advisor, WTB
Stanley P. Wiggins, WTB
John M. Spencer, WTB
Steve Weingarten, WTB

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Defining "Readily Achievable" Under Section 255

May 23, 1997

Section 255 mandates that manufacturers and service providers take certain actions to improve access to and usability of telecommunications products and services by individuals with disabilities, "if readily achievable." Although Section 255 does not define "readily achievable," the legislative history of the section indicates that Congress intended for the terminology to be defined as it is in Section II of the Americans with Disabilities Act ("ADA"). Under Section 301(9) of the ADA (42 U.S.C. §12181(9)), "readily achievable" is defined as "easily accomplishable and able to be carried out without much difficulty or expense." While we believe that this definition is appropriate to utilize under for telecommunications-related access proceedings, Section 301(9) also provides a list of factors to be used in assessing whether actions are "readily achievable" that must be modified for use with Section 255.

Section 255 and Section II of the ADA were designed to address access and use barriers in very different contexts. Section II of the ADA was crafted specifically for resolving architectural barrier problems where solutions are typically "one time only," consumer acceptance is not typically an issue, and the entity responsible for implementing a fixed solution is generally easily identified. Section 255, in contrast, attempts to resolve access issues by affecting an ongoing process where technological change is rapid, solutions can be implemented in many different ways and through different mediums, marketability can be dramatically affected by certain types of modifications, and numerous entities within the stream of commerce can impact access and use. In this different context, as discussed below, the factors used for assessing compliance with the "readily achievable" standard need to be rethought if Congress' policy objective are to be met.

Specifically, Section 301(9) of the ADA further provides that "[i]n determining whether an action is readily achievable," factors to be considered include:

- (A) the nature and cost of the action needed under this chapter;
- (B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
- (C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type and location of its facilities; and
- (D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

Below, we have provided the text of a proposed FCC rule crafted to track the intent of the ADA factors listed in Section 301(9), but revised as appropriate for use in the telecommunications context. We would propose that the FCC's rules state:

Section XX.XX – Determination of Whether Actions Are "Readily Achievable." In determining whether specific actions are readily achievable for purposes of this section, the factors to be assessed include:

- (a) the nature and cost of the action needed under this section, including (i) the cost and nature of a range of alternatives, including modifications to CPE, telecommunications equipment, services, or equipment used by individuals with disabilities; (ii) whether the access problem is better addressed by equipment manufacturers or service providers; (iii) whether the access or use problem can be solved on an individual basis or should be addressed by solutions that are more generic and that may need to be resolved by creating industry standards; and, (iv) whether the pace of technological change will render the action obsolete or of limited effectiveness given the replacement of products and services over time.

- (b) the overall cost of the product or service involved in the action; including (i) whether the cost of a particular action is disproportionate in terms of the cost, revenues, and utility of a service or piece of equipment; (ii) the impact of implementing the modification on compatibility with related local, national, and international services and equipment; (iii) whether other, external modifications are needed to equipment or services not under the control of the manufacturer or service provider to achieve improved access or use; (iv) whether the modification would cause compatibility or other technical problems with the use of the equipment or service by individuals without a particular disability or aggravate access and use problems by individuals with other types of disabilities; and, (v) the impact otherwise of such action upon the marketability or operation of the service or product.
- (c) the overall financial resources of the manufacturer or service provider involved in the action in comparison to: (i) the number and type of customers of the company overall; and (ii) the geographic nature and extent of the company's operations.
- (d) For purposes of resource assessments under this paragraph, a subsidiary and a parent company should only be treated as a single entity if the subsidiary has access to the facilities and technical, marketing, and other resources of the parent without being required by law to compensate the parent at fair market value.

As discussed in our comments on the Commission's NOI, we believe that this proposed rule appropriately reflects the factors set forth in Section 301(9) of the ADA, adapted for the telecommunications context. The factors in subsection (a), for example, fulfill the intent of Section 301(9)(A) while recognizing that changes in the telecommunications area are not one time only modifications, but rather alterations to continually evolving universe of products and services where no single entity is responsible for the final integrated solution provided to consumers. Subsection (b), like its counterpart in Section 301(9), attempts to address the impact costs and benefits of proposed changes on object being changed, but the revision addresses factors such as compatibility, marketability, and compliance with standards that do not arise in the architectural context. Subsection (c) of the proposed rule blends subsections (C) and (D) of Section 301(9), assessing the costs and benefits of a proposed change on the entity responsible for making the change, appropriately modified for the telecommunications context. Finally, the

new Subsection (d) recognizes that, in cases where subsidiaries have separate cost accounting, which is common in telecommunications but less relevant in building contexts, "financial resources" calculations under Section 255 should be modified.

Thus, we believe that the proposed rule fully preserves the intent of Congressional policy goals embodied in Section 301(9). In order to effectuate these goals within the context of telecommunications, however, the factors in Section 301(9) require some modifications, as shown in the proposed rule. We therefore urge the FCC to adopt the proposed rule to govern assessments of whether certain actions are "readily achievable" under Section 255 of the Communications Act.